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THE AMERICAN CORPORATION IN AMERICAN FOREIGN TRADE: A CASE OF ILL-DEFINED PRIVATE RIGHTS AND UNREFINED PUBLIC POWER

BY JOHN T. MILLER, JR.*

In March, 1965, the Secretary of Commerce addressed a personal appeal to 600 corporations,[1] urging them to limit future foreign investments in specified developed countries. Several "guidelines" were suggested by which individual companies might improve their balance of payment positions. Earlier in the same month, the Federal Reserve Board issued "guidelines" to banks and non-back financial institutions requesting them to exercise self-restraint in their foreign financial operations.[2] These actions were part of a vigorous attempt to arrest a drain on the gold reserves of the United States arising from an adverse balance of payments situation caused in large measure by American foreign aid and military assistance programs and the important demands of an affluent domestic economy.

By the end of July, it was reported the commercial banks had cooperated fully with the government's request, reducing their foreign loans below the recommended 1965 target volume. Business corporations had failed to comply. During the first six months of 1965 they invested $1.7 billion in foreign facilities, compared with $2.4 billion for the entire year 1964.[3] The government continued to seek its objectives through "persuasion," but more direct and forceful action was indicated if voluntary procedures were not successful.[4]

Whatever their intrinsic merit, these measures focus attention on a subject which deserves more consideration and discussion than it has so far obtained, namely, the status of American corpora-

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1. Letter from the Sec'y of Commerce to 600 corporations, March 12, 1965.

2. See Federal Reserve Bd. Press Releases of March 3 and 5, 1965. Banks with no previous foreign lending experience were positively discouraged from making foreign loans in 1965. FRB Guideline (6) for commercial banks.

3. The Washington Post, Sept. 26, 1965, § C, p. 13.

4. The Wall Street Journal, Oct. 7, 1965, p. 11. The federal government can effectively enforce compliance under the authority granted under 12 U.S.C. § 95(a) (1952). See also, Pike v. United States, 340 F.2d 487 (9th Cir. 1965).

tions[5] in foreign trade.[6]

Since World War II, the federal government has looked to American corporations for effective assistance in carrying out programs designed to improve the living standards of people of other countries, forestall the spread of communism, assure access to essential raw materials needed for the American economy in peace and in war, and to provide markets essential to maintaining the high level of output of the American economy and the living standards enjoyed by the majority of its people. Encouragement to expand exports and to invest abroad has taken many forms: loans, credit and investment guarantees, grants, favorable tax legislation, aid programs, trade fairs, business-finding activities of government aides, treaties of trade, commerce and navigation, and a myriad of intergovernmental accords and understandings.[7]

Foreign activities of American corporations have flourished under this paternalistic sunshine. But growth has created new problems and aggravated old ones, among them exposure to substantial injuries at the hands of foreign governments. Having abandoned use of armed force as a device to protect American foreign economic interests, the United States government has sought through negotiation and exhortation to create an atmosphere favorable to private foreign investment abroad. When injuries to American investors have taken place, the American government has sought through diplomacy prompt, adequate and effective compensation from the offending country. This has not always forestalled injury or provided an adequate remedy. No international tribunal[8] has come into being to replace the discredited arbitrament of force as a mode of assuring just treatment from foreign governments.[9] As a consequence, corporations have

5. Throughout this article, the term "American corporation" means an investor-owner business corporation incorporated under the laws of the United States, a State, Territory or the District of Columbia. Because of space limitations, the banking industry will not be considered.

6. By "American foreign trade" is meant the export and import of goods, services such as technology, and finance and all other manifestations of a modern economy which require activities of American corporations in foreign as opposed to interstate commerce.

7. Dillon, *United States Foreign Trade and Investment Policies*, in LEGAL PROBLEMS IN INTERNATIONAL TRADE 107 (1959): Lewis, *Doing Business Abroad — The Role of Government in Facilitating Exports*, 17 ARK. L. REV. 454 (1964).

8. The international oil companies were disenchanted when the International Court of Justice held it lacked jurisdiction to hear Great Britain's charge against Iran arising out of the seizure by the latter of the Anglo-Iranian Oil Company. The Anglo-Iranian Case, I.C.J. #93 (1952). Now these companies may have to deal with an association of nations. See *Middle East Oil on New Terms*, The Economist, June 5, 1965, pp. 1151-68.

9. Compensation upon expropriation is but a bromide. As a business corporation's *raison d'etre* is to be active in economic enterprises and not to be a custodian of funds, it understandably fights to maintain the kind of existence which allows it to freely operate its own business.

been obliged to depend more and more upon their own resources to protect their investments abroad.

The conflict of rights of governments and foreign investors has led to interminable public discussions and a vast literature.[10] Largely overlooked is the growing need for definition of the comparative rights and obligations of the government of the United States and of American corporations engaged in foreign trade. It is the purpose of this article to examine the origins and nature of this emerging problem.

THE NATURE AND SOURCE OF CORPORATE POWERS

With few exceptions,[11] American corporations engaged in foreign trade are organized and operating under charters granted by states and the District of Columbia.[12] These charters determine the nature and extent of corporate powers in the first instance.[13] Modern charters create broad powers and provide little practical restraint.[14] Even when the specified powers are limited, there has been a tendency for courts to decline to find corporate activities *ultra vires* when challenged outside the state of incorporation.[15]

The United States Supreme Court long ago concluded that a corporation has no existence, as a matter of right, outside of the state which created it. Speaking for the Court in 1839, Mr. Chief Justice Taney said:

> It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation and cannot migrate to another sovereignty.[16]

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10. *E.g.*, WORTLEY, EXPROPRIATION IN PUBLIC INTERNATIONAL LAW (1959); PLUMMER, INTERNATIONAL COMBINES IN MODERN INDUSTRY (3d ed. 1951).

11. National banks are chartered by the Controller of the Currency under the National Bank Act of 1864, as amended, 12 U.S.C. § 21 (1964). Under the China Trade Act, 42 Stat. 849 (1922), as amended, 15 U.S.C. §§ 141-62 (1964), a federal charter is issued by the Secretary of Commerce for trade in China. Both President and Treasurer must be U.S. citizens resident in Hong Kong or Taiwan.

12. However, these corporations may actually conduct some of their operations abroad through subsidiaries or affiliates incorporated under the laws of foreign countries. See Baker, *Methods and Channels of Foreign Trade*, in LEGAL PROBLEMS OF INTERNATIONAL TRADE 272 (1959); Moyer, *Operating a Corporate Enterprise Abroad*, *id.* at 142.

13. Thus, if the corporate charter limited the corporation to intrastate business, it could not lawfully engage in interstate or foreign commerce. Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 587-88 (1839).

14. See Hawkland, *Control of Foreign Corporate Activity by State of Incorporation*, 6 MIAMI L.Q. 41 (1951).

15. See FLETCHER, CYCOPEDIA OF PRIVATE CORPORATIONS § 8324 (1960).

16. Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 588 (1839).

This holding is still the law;[17] but, it has proved no impediment to the use of state charters by corporations engaged in American interstate and foreign commerce. How could this be so?

Despite the fact that the bulk of American foreign trade and investment is carried on by state-chartered corporations, their credentials to do business in foreign trade have not been challenged on the legal ground that they originate with state governments. It would seem that this is the result of several factors, deeply rooted in our country's history.

CITIZEN'S RIGHT TO ENGAGE IN FOREIGN TRADE

Foreign trade was originally carried on by individuals in the exercise of what they believed to be a basic right. In the course of a legal opinion submitted to President Washington in 1791, Alexander Hamilton, then Secretary of the Treasury, advised:

> Every person, by the common law of each State, may export his property to foreign countries, at pleasure. But Congress in pursuance of the power of regulating trade, may *prohibit* the exportation of commodities; in doing which, they would alter the common law of each state, in abridgement of individual right.[18]

A similar view obtained in Great Britain. However, the exigencies of foreign policy,[19] the multiplicity of restrictive statutes inspired by a mercantilistic philosophy,[20] and two centuries of experience in chartering joint-stock companies enjoying monopolies in trade with foreign lands,[21] so encrusted the right with state restrictions that its existence was often hard to perceive. In an opinion given in 1718 to the Lords Commissioners of Trade and Plantations on the question of whether the Crown could restrain Englishmen establishing manufacturing facilities in France, counsel advised:

> That particular subjects shall have an uncontrollable liberty of all manner of trading, is not only against the policy of our nation, but of all other governments whatsoever. I do, therefore, take it to be law, that the Crown may, upon special occasion, and for reasons of state, restrain the same; and that not only in cases of war, plague, or scarcity of any commodity, of more necessary use at home, for the provision of the subject, or the defense of the kingdom, etc. (in which cases the King's prerogative is allowed to be be-

17. However, it has not gone unchallenged. See Crutcher v. Kentucky, 141 U.S. 57 (1891).

18. 3 HAMILTON, WORKS 460 (1904).

19. Embargoes on exports or requirements that a given commodity be marketed through a specific foreign city are examples.

20. Some of these forbad the migration of skilled mechanics, or the export of cloth-making machinery.

21. *E.g.*, The Levant Co., East India Co., Muscovy Co., Hudson's Bay Co. See generally Miller, *The Corporation in International Affairs*, 4 WORLD POLICY INSTITUTE (1966).

> yond dispute,) but even for the preservation of the balance of trade: as, suppose a foreign prince, though in other respects preserving a fair correspondence and in amity with us, yet will not punctually observe such treaties of commerce as may have been made between the two nations; or, in case there are no such treaties existing, refuses to enter into such a regulation of trade as may be for the mutual advantage and benefit of both dominions: on such occasion, I am of opinion that the King, by his prerogative, may prohibit and restrain all his subjects in general, from exporting particular commodities, etc.; or else, generally, from trading to such a particular country or place; since trade does not only depend upon the will or laws of the prince, whose subjects adventure abroad to carry it on, but also of that prince into whose country the commodities are exported, and with whose subjects commerce is negotiated and contracted; without such a power, it is obvious that the government of England could not be upon equal terms with the rest of its neighbors, and since trade depends principally upon such treaties and alliances as are entered into by the Crown with foreign princes; and, since the power of entering into such treaties is vested absolutely in the Crown, it necessarily follows that the management and direction of trade, must, in a great measure, belong to the king.[22]

Counsel went on to cite as precedent an earlier experience where, upon a determination that the kingdom was being prejudiced by the commercial activity, English authorities actually went to Russia and destroyed tobacco machinery exported from England and operated there by English workmen.

The American Revolution was fought to defend the rights of Englishmen, rights which were considered natural and inviolable, however ignored, abused or shackled in practice by the British government. Blackstone had reasoned that these rights could be reduced to three principal or primary articles: "the right of personal security, the right of personal liberty, and the right of private property."[23] Was the right to engage in foreign trade one of these rights?

It is apparent that the founding fathers intended that the rights of "property" safeguarded by the Constitution were not limited to tangible property already acquired, but included as well the right to work for a living in the common occupations[24] and to ac-

22. See CHALMERS, OPINIONS OF EMINENT LAWYERS, 549-550 (1858).

23. 2 BLACKSTONE, COMMENTARIES 129 (Tucker's ed. 1803). Almost six centuries earlier, King John (1167-1216) agreed that such rights could be expressed in these terms in Chapter 39 of the Magna Carta (1215):

> No free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will we proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land.

24. See Greene v. McElroy, 360 U.S. 474 (1959); Truax v. Raith, 239 U.S. 33, 41 (1915).

quire property; in other words, the right to trade, to manufacture and to engage in commerce.[25] But from the beginning, as Hamilton observed, it was recognized that the right to engage in foreign trade was subject to the lawful exercise by the federal government of its powers.

> A new tariff, an embargo, or a war, might bring upon individuals great losses; might, indeed, render valuable property almost valueless,—might destroy the worth of contracts. 'But whoever supposed' asked the Court, 'that, because of this a tariff could not be changed or a nonintercourse act, or embargo be enacted, or a war be declared.'[26]

STATE CHARTERS MET BUSINESS NEEDS

Early state-chartered business corporations were small, managed by their owners and engaged in domestic commerce.[27] Their operations were severely circumscribed; their charters strictly construed against the grantees.[28] Nonetheless, these corporations proved so sensible and successful a form of business organization that before 1850 most of the transportation, banking, insurance, manufacturing and mining interests had passed into their hands.[29] The corporations were active in interstate commerce.[30] But it was not until manufacturers constituted a substantial part of the foreign exports of the United States after 1880 that corporations came to play any significant role in trade with other countries.[31]

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25. See DUMBAULD, THE DECLARATION OF INDEPENDECE AND WHAT IT MEANS TODAY 60-61 (1950).

In Greene v. McElroy, 360 U.S. 474, 492 (1959), Chief Justice Warren said ". . . the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and property concepts of the Fifth Amendment . . . ." U.S. CONST. amend. IX providing "[t]he enumeration in the Constitution of certain Rights shall not be construed to deny or disparage others retained by the people." As yet, only the right to engage in political activity has been recognized as coming under this amendment. See United Public Workers v. Mitchell, 330 U.S. 75, 94 (1947).

26. Norman v. Baltimore & O. R.R., 294 U.S. 240, 305 (1935).

27. For an excellent description of the evolution of corporate activities, particularly in New England, during the early part of the eighteenth century, see DODD, AMERICAN BUSINESS CORPORATIONS UNTIL 1860 (1954).

28. See Beaty v. Knowles, 29 U.S. (4 Pet.) 152 (1830); Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 152 (1830).

29. 1 JOHNSON, HISTORY OF DOMESTIC AND FOREIGN COMMERCE IN THE UNITED STATES 308 (1915).

30. Massachusetts corporations engaged in the manufacture of cotton cloth purchased raw cotton and sold finished goods outside the state of manufacture from the beginning of the nineteenth century. Daniel Webster so advised the Supreme Court in his argument in Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 561 (1839). However, it was not until 1857 that Massachusetts by statute authorized all locally chartered manufacturing and mining corporations to carry on all or a part of their business beyond the borders of the Commonwealth. DODD, AMERICAN BUSINESS CORPORATIONS UNTIL 1860 (1954).

31. Bureau of Statistics, U.S. Treasury Dep't, *Exports of Manufactures*

After the Civil War, state-chartered corporations grew in size and number. The largest of them, the so-called "trusts," played a dominant role in the upward surge of exports of manufactures at the end of the century.[32] Although sometimes very large, these nineteenth century corporations had few shareholders.[33] It was this identity of owners and managers which undoubtedly caused Justice Bradley to observe:

> To carry on interstate commerce is not a franchise or a privilege granted by the state; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States; and the accession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such right, unless Congress should see fit to interpose some contrary regulation on the subject.[34]

The corporations which play a vital role in American foreign trade today are of quite a different character. Not only have they become very much larger[35] but divorcement of management and ownership became the norm.[36] Today one can not be sure at any given moment, without considerable investigation, who owns or controls the modern American corporations whose stock is traded on the public exchanges. Ownership, control or management by American citizens is never assured, and the future offers no immediate clarification of this kaleidoscopic scene. The emerging role of pension and investment funds as purchasers of common stocks promises new *eminences grises.*

Recognition of a basic right in the citizen to engage in foreign trade undoubtedly helped the corporation to become acceptable as a device of business organization in foreign trade when *laissez-faire* was the philosophy of the federal government. But no vested rights were obtained thereby. As charters of the corporations engaged in foreign trade did not come from the federal government,[37] no right of contract between corporations and government would be violated by subsequent federal regulation. Nor did federal power weaken for lack of exercise during these years.

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from the United States, 1790-1902, Monthly Summary of Commerce and Finance of the United States 3242, 3245 (April 1903).

32. 2 JOHNSON, *op. cit. supra* note 29, at 134.

33. Six persons owned and controlled The American Tobacco Company, organized in 1904 and capitalized at $180 million. See United States v. American Tobacco Co., 221 U.S. 106, 173 (1811). The Standard Oil "Trust" was similarly in the hands of a few persons. Standard Oil Co. v. United States, 221 U.S. 1 (1911).

34. Crutcher v. Kentucky, 141 U.S. 47, 57 (1891).

35. See *Companies Outgrow Countries,* The Economist, October 17, 1964, p. 271.

36. Vividly publicized for the first time in the classic study by BERLE & MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932).

37. *Cf.,* Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

Why then did businessmen rely upon state charters for their foreign trade activities? State charters met the observed needs of the business community. There has been no real demand for federal charters. Let us take up this latter point first.

No Apparent Business Need for Federal Charters

American foreign trade came to be dominated by state-chartered private corporations both by design and default. Although delegated exclusive power to regulate foreign commerce, the federal government declined the role of provender of corporate charters to private enterprises wishing to engage in foreign trade.

The Constitution of the United States does not contain a specific grant of power to Congress to charter private corporations. Within a few years of its adoption, the draftsmen were quarreling over whether the federal government had such a power.[38] During the Constitutional Convention of 1787, James Madison submitted a list of powers, to be added to those of the General Legislature, which included the power "to grant charters of incorporation in cases where the Public good may require them, and the authority of a single State may be incompetent."[39] Apparently the recommendation died in committee.

On September 14, 1787, in the course of consideration of the text of article I, section 8, prepared by the Committee of "Stile & arrangement," Madison attempted to insert his recommendation into the Constitution by enlarging a motion made by Benjamin Franklin relating to the grant of power to build canals. Madison's journal summarizes his own argument:

> His primary object was however to secure an easy communication between the States which the free intercourse now to be opened, seemed to call for—The political obstacles being removed, a removal of the natural ones as far as possible ought to follow.

Edmund Randolph of Virginia seconded the proposal. Madison's notes of the ensuing debate show the temper of the times. Rufus King of Massachusetts opposed on the ground that the power was unnecessary, would arouse opposition in the states, and might be viewed in terms of the establishment of a bank or mercantile monopoly. Mason of Virginia would have limited the power to canals, fearing molopolies of every sort.[40] James Wilson of Penn-

38. A similar problem arose under the Articles of Confederation. In 1781 the Bank of North America was chartered by Congress. Three states, including Pennsylvania, enacted auxiliary charters to assure the bank's right to do business. The directors of the bank took out a Delaware charter to protect the bank when Pennsylvania repealed its incorporating statute. See Davis, *Essays in the Earlier History of American Corporations, No. IV*, in Eighteenth Century Business Corporations in the United States 10-12, 30 (1917).

39. 4 Madison, Writings 229 (Hunt ed. 1903).

40. This fear of monopolies was not unreasonable. It reflected the experience of the colonists at the hands of the great corporations chartered

sylvania considered the power necessary to prevent a state from obstructing the general welfare: "As to mercantile monopolies they are already included in the power to regulate trade." Madison's motion was rejected eight votes to three.[41] So ended the record of debates on the power to charter corporations.

Congress enacted a statute in 1791 establishing the Bank of the United States.[42] Before signing the bill, President Washington asked Secretary of State Jefferson, Attorney-General Randolph, and Secretary of the Treasury Hamilton to advise him as to the legality of a federal charter for such a corporation.[43] Jefferson and Randolph replied in the negative. Jefferson asserted that the debates in the convention and the vote against Madison's motion required the conclusion that the power to charter corporations had been denied. "It is known that the very power now proposed *as a means* was rejected as *an end* by the Convention which formed the Constitution."[44]

Hamilton justified the constitutionality of the legislation by reliance upon a doctrine of implied powers: Congress has the power to do all things reasonably necessary to carry out the powers specifically granted by the Constitution. In those areas in which the federal government, by virtue of the grant of specific power, is supreme, it enjoys sovereignty; and, one of the attributes of sovereignty is the power to charter corporations. A corporation should be considered, therefore, only as a means of carrying out a specific power set forth in the Constitution. As for the action of the Constitutional Convention in denying Madison's proposal, Hamilton concluded that this proved nothing one way or the other. The precise nature or extent of the proposal or the reasons for refusing it could not be ascertained from any authentic document or accurate recollection.[45] The bill became law.

Twenty-eight years later the Supreme Court adopted Hamilton's arguments in upholding the charter of the second Bank of the United States.[46] Chief Justice Marshall, speaking for the Court,

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by the Crown. See 2 DAVIS, CORPORATIONS, Ch. III-VI (Capricorn ed. 1961). Pitt once observed that it was not true that commercial companies could not govern empires; the East India Company had done just that for many years. See AUBER, AN ANALYSIS OF THE CONSTITUTION OF THE EAST INDIAN COMPANY 79 (1826).

41. DOCUMENTARY HISTORY OF THE UNITED STATES (1787-1870) 744-45.

42. 1 Stat. § 3 (1861).

43. Each of these gentlemen had participated in the Constitutional Convention, although all probably were not present during the debates on September 18, 1789.

44. 3 JEFFERSON, WRITINGS 149 (Bergh ed.). (Emphasis added.)

45. 3 HAMILTON, WORKS 462 (federal ed. 1904).

46. The charter of the first Bank of the United States expired by its terms in 1811. The second Bank was chartered in 1816. Whatever scruples Madison might have had during the Constitutional Convention as to the power of the Congress to charter corporations were by now laid to rest. He signed the charter of the new bank.

intoned:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.
>
> That a corporation must be considered as a means not less usual, not of higher dignity, not more requiring a particular specification than other means, has been sufficiently proved. If we look to the origin of corporations, to the manner in which they have been framed in that government from which we have derived most of our legal principles and ideas, or to the uses to which they have been applied, we find no reason to suppose that a constitution, omitting, and wisely omitting, to enumerate all the means for carrying into execution the great powers vested in government, ought to have specified this. Had it been intended to grant this power as one which should be distinct and independent, to be exercised in any case whatever, it would have found a place among the enumerated powers of the government. But being considered merely as a means, to be employed only for the purpose of carrying into execution the given powers, there could be no motive for particularly mentioning it.[47]

The question of the power of the federal government to charter corporations was thus laid to rest, never thereafter to be effectively challenged in the courts. But it was a Pyrrhic victory. President Jackson continued his vendetta against the Bank. Its charter expired and was not renewed.

Congress became reluctant to charter any new business corporation. Thereafter, applicants would have to demonstrate a direct relationship between the act of incorporation and the power granted Congress under the Constitution. And Congress would have to be persuaded that a corporation chartered by the federal government was a necessary means of achieving the objective.[48]

Congress did issue some business corporation charters during the remainder of the nineteenth century. Banks were the principal beneficiaries; some of the charters obviously designed to meet the particular needs of the District of Columbia.

Communications also attracted the attention of Congress. A few interstate bridge corporations were chartered.[49] In 1862, with the encouragement of President Lincoln, Congress chartered the Union Pacific Railroad Company to build a transcontinental railroad from the Missouri River to the Pacific Ocean and to secure to the government the "use of the same for Postal, Military and Other

47. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 411, 421 (1819).

48. See Davis, *Essays on the Earlier History of American Corporations, No. IV*, in EIGHTEENTH CENTURY BUSINESS CORPORATIONS IN THE UNITED STATES 15-16 (1917).

49. See Luxton v. North River Bridge Co., 153 U.S. 525 (1894).

Purposes."[50] Other interstate railroad company charters followed, their legality upheld by the Supreme Court.[51]

In the present century, the federal government has frequently found it desirable to charter corporations to engage in activities of a business nature, principally during wars and economic crises.[52] Few, if any, were privately-owned. While the charters sometimes were drawn to permit private participation, they usually resulted in ownership and control by the federal government.[53]

It is interesting to observe that state-chartered corporations had become so well accepted as the *modus operandi* of the business world, that the federal government itself applied for and was issued charters by State governments.[54] Corporations owned and controlled by the federal government were chartered under the laws of the States of Alabama, Delaware, Maryland, New Jersey, New York, Tennessee, Washington, the District of Columbia and the Virgin Islands.[55] An unhappy Congress brought a stop to this practice in 1945, ordering all such state-chartered corporations to be wound up by 1948 and forbidding the organization of further corporations by the federal government except pursuant to Act of Congress.[56]

The twentieth century has also witnessed sporadic efforts to introduce federal charters into the private business world, but without success. The Commissioner of Corporations under President Theodore Roosevelt recommended to Congress the enactment of a system of federal licensing as a device to regulate private corporations engaged in interstate commerce.[57] This was at a time when a growing concern over "trusts" and monopolies brought about a re-

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50. 12 Stat. 489 (1862).

51. See Pacific R.R. Removal Cases, 115 U.S. 1 (1885); California v. Pacific R.R., 127 U.S. 1 (1888).

52. Seven corporations were established to help prosecute World War I. Banking and credit institutions were founded under the Federal Reserve Act of 1913, the Farm Loan Act of 1916, Agricultural Credits Act of 1923, Home Loan Act of 1932 and the Agricultural Adjustment Act of 1932. By 1944 there were 40 corporations operating under the supervision of government agencies and four independent government corporations (TVA, TVA Assoc. Coops. Inc., FDIC, and Panama Railroad Company). See *Reduction on Nonessential Federal Expenditures: Government Corporations, Additional Report of the Joint Committee on Reduction of Nonessential Federal Expenditures*, S. Doc. No. 227, 78th Cong., 2d Sess. (1944) 1-2, 24.

53. See Sloan Shipyards v. United States Fleet Corp., 258 U.S. 549, 565 (1922).

54. Reasons why the federal government should charter its corporations under state law were found difficult to understand. See *Reduction of Nonessential Federal Expenditures: Government Corporations, op. cit. supra* note 52, at 27.

55. *Id.* at 26.

56. Government Corporation Control Act, 31 U.S.C. § 869 (1964).

57. *Report of the Commissioner of Corporations*, H.R. Doc. No. 165, 58th Cong., 3d Sess. 47 (1904).

vival of the Sherman Act.[58] In his report, the Commissioner concluded:

> [Compulsory federal incorporation] is probably legally practicable, but it involves radical industrial and political changes by the centralization of power in the Federal Government, and presents serious difficulties because of its effect upon the authority of the States over such corporations in matters of taxation and local regulation. Any optional law of this character would not overcome these difficulties.[59]

In 1910 President Taft recommended a permissive federal incorporation bill,[60] as did President Wilson after him.[61] Neither was successful.

There was so little interest in requiring federal charters for business corporations that when Congress in 1918 provided for exemption from the Sherman Act of associations "entered into for the *sole* purpose of engaging in export trade,"[62] it did not require or even suggest federal charters for the corporations which would enjoy the benefits of the statute.

Interest in federal licensing was rekindled in the 1930's by Senators Borah and O'Mahoney in an effort to restrain the economic power of the large state-chartered corporations, and has been renewed from time to time,[63] always without success.[64] Congress has failed to enact compulsory federal incorporation legislation not because it lacks the power but because neither Congress nor the business community was persuaded of the need.[65] The late Senator

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58. President Roosevelt's energetic actions resulted in landmark antitrust decisions in Northern Securities Co. v. United States, 193 U.S. 197 (1904); Standard Oil Co. v. United States, 221 U.S. 106 (1911). In the process, the Supreme Court overturned its decision in United States v. E. C. Knight, 156 U.S. 1 (1895), it declined to break up the Sugar Trust, holding that production and manufacturing were not commerce within the meaning of the Sherman Act.

59. *Report of the Commissioner of Corporations, op. cit. supra* note 57.

60. For a discussion of alleged constitutional issues raised by this proposal, see HEISLER, FEDERAL INCORPORATION, CONSTITUTIONAL QUESTIONS INVOLVED (1913).

61. *Utility Corporations, Compilation of Proposals and Views for and Against Federal Incorporation or Licensing of Corporations etc.*, S. Doc. No. 92, 17, 70th Cong., 1st Sess. (1928).

62. Webb-Pomerene Act, 15 U.S.C. §§ 61-65 (1964). (Emphasis added.) Proposals for the statute followed publication in 1916 by the then very new Federal Trade Commission of its two volume report entitled COOPERATION IN AMERICAN EXPORT TRADE.

63. The Temporary National Economic Committee recommended in its final report in 1941 that Congress enact legislation setting up "national standards for national corporations." See Final Report and Recommendations of the Temporary Economic Committee, S. Doc. No. 35, 77th Cong., 1st Sess. 29 (1941).

64. REUSCHLEIN, THE SCHOOLS OF CORPORATE REFORM 43 (1950); 1 FLETCHER, CYCLOPEDIA OF PRIVATE CORPORATIONS § 2.3 (1960).

65. This judgment is based upon the small number of private business

O'Mahoney viewed the problem in these terms:

> Thus the paradox pursues us. Its most striking aspect in our time is to be found in the fact that, although no serious argument is made against the all-inclusive nature of the power of Congress to regulate commerce, the Congress still clings to the dead past by refusing to take the necessary step to define the powers and responsibilities of the corporate agencies which carry on the commerce everybody recognizes Congress has the power to regulate. Because it has failed to define these powers and responsibilities it has surrendered a substantial part of its inherent power to private monopolies which have been growing apace under charters issued by the states; charters which create gigantic corporate units to operate in the very field of national and international commerce, jurisdiction over which was specifically taken from the states. . . .[66]

Antitrust laws, securities controls, and other remedial legislation have curbed the most patent abuses of private corporations in interstate trade. In foreign trade, where the corporations are shepherded by the same laws, a more significant factor is present. The President has vast powers in foreign affairs, their limits only partly defined by legislation. While the ultimate tests of legality of Presidential acts are to be applied by the courts, we cannot expect to receive definitive guidance from that quarter.[67] State-chartered corporations have not been treated as trespassers in American foreign trade. Their role in foreign commerce over a period of 150 years has been recognized by burgeoning federal statutes and regulations, and protected by treaties.

Source of Federal Power Over Foreign Trade

Congress is given exclusive power under the Constitution to regulate commerce with foreign nations.[68] The conduct of foreign affairs, imposition of tariffs, national defense, the waging of war, banking and currency and many other functions of the federal government provide a very broad basis for the powers of the

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corporation charters granted by Congress over the past 150 years. See Fennell, Corporations Chartered by Special Act of Congress (rev. ed. 1958).

66. O'Mahoney, *Federal Charters to Save Free Enterprise*, 1949 Wis. L. Rev. 407, 408-9.

67. The following observation by Mr. Justice Frankfurter is still apt:

> The history of American constitutional law in no small measure is the history of the impact of the modern corporation upon the American scene. We are still sadly awaiting a comprehensive account of the pervasive influence of corporate enterprise upon our national life, and its judicial aspect is only very partially written in the opinions dealing with constitutional protections claimed for incorporated business.

Frankfurter, The Commerce Clause Under Marshall, Taney and Waite 63 (1937).

68. U.S. Const. art. I, § 8, cl. 3.

President and of Congress in foreign trade and international affairs.[69] The Supreme Court has held that many of these powers of the federal government are inherent attributes of sovereignty:

> [T]he investment of the federal government with the power of external sovereignty did not depend upon the affirmative grants of the Constitution. The power to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the Federal Government as necessary concomitants of nationality.[70]

The sovereign creating a corporation has visitorial powers over it, the power to assure itself that the corporation which is its creature is not abusing the charter.[71] The powers of the courts might be utilized, through writs of *quo warranto* and *mandamus*, to police the corporation's activities. The charter can be withdrawn.

The federal government has such powers as to the corporations it charters by virtue of the fact that it is the source of the corporation's existence and powers.[72] While declining to hold that the federal government has a general visitorial power over state corporations, the Supreme Court has held that as to interstate commerce it had "in vindication of its own laws, the same power it would possess if the corporation had been created by act of Congress."[73]

As an adjunct of its vast power over foreign affairs, the federal government has the power to investigate corporate activities. In the exercise of this power, Congress gave the Federal Trade Commission authority

> To investigate, from time to time, trade conditions in and with foreign countries where associations, combinations, or practices of manufacturers, merchants, or traders, or other conditions, may affect the foreign trade of the United

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69. The verdict of history, in short, is that the power to determine the substantive content of American foreign policy is a *divided* power, with the lion's share falling usually, though by no means always, to the President.

CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787-1957, 171 (1957).

The courts avoid enquiry into "political questions" arising in foreign affairs. Foster v. Neilson, 29 U.S. (2 Pet.) 253 (1829); C & S Airlines v. Waterman Corp., 333 U.S. 103 (1948).

70. United States v. Curtiss-Wright Corp., 299 U.S. 304, 318 (1936).

71. See State *ex rel.* Cuppel v. The Chamber of Commerce of Milwaukee, 47 Wis. 670, 679-80, 3 N.W. 760, 763-64 (1879).

72. In United States v. Union Pac. R.R., 98 U.S. 569 (1878), the Court noted:

> The company is organized under, and owes its corporate existence to, an act of Congress. The government has all the rights which belong to any other government as a sovereign and legislative power over this creation of that power. . . .

Id. at 613.

73. Interstate Commerce Commission v. Goodrich Transit Co., 224 U.S. 194, 215, citing Hale v. Henkel, 201 U.S. 43, 75 (1906).

> States, and to report to Congress thereon, with such recommendations as it deems advisable.[74]

The investigative power is frequently exercised also through the vehicle of congressional hearings. The principle, however, has not yet been accepted that the federal government through the executive branch may monitor corporate activities, in the absence of specific enabling legislation, to ensure that the corporate activities are consistent with and support foreign policy. The power to do just that exists, but as yet it is largely unused. Persuasion, rather than compulsion is still deemed preferable.[75] Ample scope for individual initiative and decisions inconsistent with the government's foreign policy are allowed. A centrally planned foreign policy program completely coordinating the public and private sectors has not yet been accomplished.

The President is invested by the Constitution with broad political powers "in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience."[76] Does this mean that he is above the law? The Supreme Court has held: "The prohibitions of the Constitution were designed to apply to all branches of the national government and they cannot be nullified by the Executive or [in a treaty] by the Executive and the Senate combined."[77] It may be added, however, that the courts have been reluctant to enjoin the President in the performance of his duties or to hold his actions unlawful.[78]

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74. 15 U.S.C. § 46(h) (1952); see Kronstein, *Reporting on Corporate Activity* 38 U. DET. L.J. 589 (1961).

75. We have a plan to get together, with these key countries, representative groups of American businessmen of the kind that you find in the ordinary chamber of commerce and try to be persuasive with them that it is in their longrun, self-interest to behave in a very responsible fashion as far as these countries are concerned. We will thus use our power of persuasion plus our power to make laws, investment guarantees, and things of that kind.

These are the two things we are trying to do about it, because those, as I see it, are about the only two areas in which we can really be effective, since we do not have any legislative power to require.

Testimony of Mr. Fowler Hamilton, Administrator, Agency for International Development, *Foreign Assistance Act of 1962, Hearings before the Committee on Foreign Relations on S.2996*, 87th Cong., 2d Sess., pp. 113-114 (1962).

76. Chief Justice Marshall in Marbury v. Madison, 5 U.S. (1 Cranch.) 165 (1803).

77. Reid v. Covert, 354 U.S. 1, 66 (1957).

78. See United States v. Curtiss-Wright Corp., 299 U.S. 304 (1936). *Cf.* Youngstown Co. v. Sawyer, 343 U.S. 579 (1952), where it was held that the President's seizure of the steel mills of the country to avert a nationwide strike might be enjoined because it involved an attempted exercise of the law-making power vested in Congress. Zinn, *Extent of the Control of the Executive by the Congress of the United States*, 87th Cong., 2d Sess. (1960), Committee Print, for use of the Committee on Government Operations (1962).

FEDERAL LAWS AND REGULATIONS

In interstate and foreign commerce, states may not permit what the federal government forbids.[79] Consequently, neither a provision in a corporate charter granted by a state nor state corporation law may sanction business activities outlawed by Congress. In *Northern Securities Co. v. United States*,[80] suit was brought by the Attorney General under the anti-monopoly provision of the Sherman Act[81] to enjoin a New Jersey corporation from holding the shares of two competing interstate railroads serving the far west. The defendant insisted that its actions were lawful because they enjoyed the sanction of the law of the State of New Jersey which granted its charter. The Supreme Court rejected this contention:

> So far as the constitution of the United States is concerned, a state may, indeed, create a corporation, define its powers, prescribe the amount of its stock and the mode in which it may be transferred. It may even authorize one of its corporations to engage in commerce of every kind; domestic, interstate and international. . . . But neither a state corporation or its stockholders can, by reason of the non-action of the state or by means of any combination amongst such stockholders, interfere with the complete enforcement of any rule lawfully devised by Congress for the conduct of commerce among the states or with foreign nations; for, as we have seen, interstate and international commerce is by the constitution under the control of Congress, and it belongs to the legislative department of the government to prescribe rules for the conduct of that commerce. . . . So long as Congress keeps within the limits of its authority as defined by the constitution, infringing no rights recognized or secured by that instrument, its regulations of interstate and international commerce, whether founded in wisdom or not, must be submitted to by all.[82]

The power of Congress over foreign trade is very broad.[83] Whether carried on by individuals or by corporations,[84] Congress may free foreign commerce from any encumbrance; or it can encourage, regulate, tax, restrain or even prohibit it.[85] While Con-

79. "The power to regulate commerce among the several States was granted to Congress in terms as absolute as the power to regulate commerce with the foreign nations." Pittsburgh Coal Co. v. Bates, 156 U.S. 577, 587 (1895). See also United States v. Carolene Products Co., 304 U.S. 144, 147-48 (1938).

80. 193 U.S. 197 (1904).

81. 15 U.S.C. §§ 1, 2 (1964).

82. Northern Securities Co. v. United States, 193 U.S. at 347.

83. However, it may not delegate its regulatory power to a state or state agency. See Safe Harbor Water Power Corp. v. Federal Power Comm., 124 F.2d 800, 807 (3d Cir. 1941), *cert. denied* 313 U.S. 546 (1940).

84. Paul v. Virginia, 75 U.S. (8 Wall.) 182 (1869).

85. Board of Trustees v. United States, 289 U.S. 48 (1933). See also, STORY, CONSTITUTION § 1076 (5th ed by Bigelow 1891) which states:

Many of the like powers have been applied in the regulation of

gress has the power to preclude the states from any role whatsoever in foreign commerce, it has not chosen as yet to do so. So long as this federal power remains unexercised, the state-chartered corporations may play their roles,[86] though they exist in foreign trade by sufferance of the federal government.

Federal regulation of state-chartered corporations in foreign trade usually takes the form of encouragement or discouragement of certain types of activities.[87] It is assumed that the corporation can engage in foreign trade under its charter.[88] The Sherman Anti-trust Act of 1890, for example, designed to free interstate and foreign commerce from the impediments of unlawful monopolies and restraints of trade, was made applicable to "corporations and associations existing under and authorized by the laws of either the United States, the laws of any of the Territories, *the laws of any State*, or the laws of any foreign country."[89] As early as 1911, the Supreme Court enforced this statute by ordering both English and state-chartered American corporations to abrogate their agreement confining themselves to their respective domestic markets.[90] Teeth were added to the order dissolving the monopoly by a provision that if the order was not complied with "it shall be the duty of the court, either by way of an injunction restraining the movement of the products of the combination in the channels of interstate or *foreign commerce* or by the appointment of a receiver, to give effect to the requirements of the statute."[91]

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foreign commerce. The commercial system of the United States has also been employed for the purpose of revenue; sometimes for the purpose of prohibition; sometimes for the purpose of retaliation and commercial reciprocity; sometimes to lay embargoes; sometimes to encourage domestic navigation, and . . . shipping. . . . In all of these cases, the right and duty have been conceded to the national government by the unequivocal voice of the people.

86. However, the Supreme Court has seldom upheld state regulation of foreign trade. See Henderson v. New York, 92 U.S. 259 (1876). My conclusion here is based on the practical necessities of the situation, a standard recognized by the Court in some cases where state regulations have affected interstate commerce. See Southern Pacific Co. v. Arizona, 325 U.S. 761, 766-67 (1945); Parker v. Brown, 317 U.S. 341 (1943).

87. As where it encouraged the development of the foreign routes of American airlines. See Pan American World Airways v. United States, 371 U.S. 276. N.3 (1963).

88. It would not appear necessary to seek the justification of this recognition in any "real" as opposed to "fiction" theory of the nature of a corporation. For a description of various such theories see Wolff, *On the Nature of Legal Persons*, 54 L. Q. REV. 494 (1938).

89. § 8, 26 Stat. 210 (1890), 15 U.S.C. § 7 (1964). (Emphasis added.)

90. United States v. American Tobacco Co., 221 U.S. 106 (1911). For a recital of American experience in applying the federal antitrust laws to international trade, see BREWSTER, ANTI-TRUST AND AMERICAN BUSINESS ABROAD (1958); FUGATE, FOREIGN COMMERCE AND THE ANTI-TRUST LAWS (1960); KRONSTEIN, MILLER & DOMMER, MAJOR AMERICAN ANTI-TRUST LAWS ch. 12 (1965).

91. United States v. American Tobocco Co., 221 U.S. at 188. (Emphasis added).

Competing corporations desiring to work together to develop foreign trade can enjoy a limited exemption from the antitrust laws if they carry on the business through an association submitted to the superintentendence of the Federal Trade Commission.[92] The statute is silent as to the source of the charters of the corporations entitled to enjoy the benefits of this statute. As a consequence, state-chartered corporations enjoy the privilege.

Ocean shipping companies must file their agreements affecting rates, terms and conditions with the Federal Maritime Commission which may, after hearing, modify them to bring them into line with criteria adopted by Congress.[93] Air fares relating to foreign flight, arrived at under the aegis of the International Air Transport Organization are overseen by the Civil Aeronautics Board. The export of natural gas[94] and of electric power[95] by corporations is regulated by statutes. But none of these laws makes any reference to the source of the corporation's charter.

Armaments, including technology relating thereto, can be exported, if at all, by corporations only upon compliance with the International Traffic in Arms regulations of the Department of State,[96] the patent regulations of the Commissioner of Patents[97] and applicable Defense Department security regulations.[98] The Department of Commerce has a vast number of regulation applicable to corporations governing other areas of exports.[99] All of these regulations apply to state-chartered corporations.

Certain areas of the world—notably the communist countries —are made off-limits to all American corporations unless specific government assent is obtained,[100] a modern kin of the embargo imposed in 1807 under President Jefferson.[101] Currency and securities controls, ebbing and flowing with the demands of war and peace, are applicable to every American corporation.[102]

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92. A function created by the Webb-Pomerene Act, 40 Stat. 516 (1918), 15 U.S.C. §§ 861-65 (1964). As to the limited character of the exemption, see United States v. United States Alkali Export Association, 86 F. Supp. 59 (S.D. N.Y. 1949).

93. 46 U.S.C. § 817(b)(5) (1952).

94. Natural Gas Act § 3, 15 U.S.C. § 171b (1964).

95. Federal Power Act § 202(e), 16 U.S.C. § 824a (1964).

96. See 22 C.F.R. § 121 (1958).

97. See 35 U.S.C. §§ 5, 181-188 (1964). See also 37 C.F.R. §§ 5.1-5.23 (1960).

98. See Ansell & Hamilton, *Security Considerations in Filing Patents Abroad*, 50 A.B.A.J. 946 (1964).

99. Export Control Act of 1949, 50 U.S.C. §§ 2021-2032 (1964). See the regulations under this act in 15 C.F.R. § 385 (1965).

100. *E.g.*, U.S. DEP'T OF COMMERCE, CURRENT EXPORT BULL. No. 891 (1964).

101. 1 MORRISON & COMMAGER, THE GROWTH OF THE AMERICAN REPUBLIC 394 (1962).

102. 12 U.S.C. § 95(a) (1964).

CONTROL OVER FOREIGN TRADE BY TREATY

Treaties, to the extent that they refer to the subject, are designed to protect American corporations engaged in foreign trade against unlawful injury at the hands of other countries, and American corporations owned by nationals of the co-contracting state against discrimination by the United States Government. They also serve to facilitate corporate activities in international trade.[103]

The Treaty of Friendship, Commerce and Navigation with the United States and Netherlands, signed at The Hague on March 27, 1956,[104] defines and safeguards the rights of "companies of either Party." Article XXIII, paragraph 3, states: "Companies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof and shall have their juridical status recognized within the territories of the other Party." This sophisticated language, found in a number of treaties executed since World War II,[105] effectively cloaks the fact that it is states and not the United States Government which charter the American corporations it is protecting.

Treaties entered into earlier in this century gave more precise recognition of the origins of corporate charters. For example, the 1927 Treaty of Friendship, Commerce and of Consular Rights between the United States and Honduras, refers to corporations "which have been or may hereafter be organized in accordance with and under the laws, national, *State*, or Provincial, of either High Contracting Party and maintain a central office within the territories thereof."[106]

Commercial treaties entered into a century or more ago, and still effective, reflect the small part then played by corporations in American foreign trade. Treaty provisions speak of the rights of "American citizens" or "citizens of the United States";[107] protection sought against discriminatory duties on the "growth produce or manufacture" of the United States.[108] There is no reference to corporations as such.

Of course, the fact that a corporation is chartered in the United States does not guarantee treaty protection. The 1951 Treaty of Friendship, Commerce and Navigation between the United States

103. See WILSON, UNITED STATES COMMERCIAL TREATIES AND INTERNATIONAL LAW (1960); Haight, *Restrictive Business Practice Clauses in United States Treaties: An Anti-trust Tranquilizer for International Trade*, 70 YALE L. J. 240 (1960).

104. T.I.A.S. No. 3942.

105. Similar language is used in other recent treaties. See Ireland, Japan, Korea, Nicaragua, Israel, Denmark, Federal Republic of Germany, T.I.A.S. No. 2155, 2863, 3947, 4024, 2948, 4797 and 3593.

106. T.C. No. 764, art. VIII. (Emphasis supplied.)

107. Treaty of Amity and Commerce with the United States and Muscat, 1833 T.S. No. 247.

108. Treaty of Friendship, Commerce, and Navigation with the United States and Paraguay, 1859, T.S. No. 272.

and Greece specifically provides that each country may deny the advantages of the treaty, except juridical status and appearance in court, to any company "even though it may have the nationality of the other Party, as long as ownership or direction of the company is controlled by nationals or companies of a third country."[109]

The United States has at times recognized such a distinction in cases involving American corporations. The assistance of the United States in obtaining redress against another country has been refused where it was found that the ownership and control of the American corporation were in the hands of aliens.[110] On the other hand, a California corporation wholly-owned by a Japanese corporation was held by American courts to lack standing to invoke a treaty with Japan as a defense against a federal antitrust suit.[111]

These treaties do not guarantee any person—national or alien—the right to engage in American foreign trade, whether as an individual or through the vehicle of a corporation. "National treatment" and "most-favored nation treatment" may be assured.[112] Nonetheless, the American government may, and sometimes does, require that corporations engaged in certain types of activities, such as ocean shipping,[113] telecommunications,[114] and aircraft production essential to national defense[115] be owned and controlled by nationals.

By virtue of the expressly or impliedly reserved right to enact legislation concerning national defense[116] or foreign trade,[117] the government has considerable power to affect corporate activity. Such actions may be discriminatory yet still lawful, so long as they do not fall below international laws standards of procedural and substantive due process.[118]

FEDERAL-STATE CONFLICT CANNOT BE RESOLVED BY "COMITY"

Federal courts have recognized the factual existence of corpora-

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109. Art. XXIII, para. 1(f), T.I.A.S. 3057.

110. See 5 HACKWORTH, DIGEST OF INTERNATIONAL LAW 839 (1943).

111. United States v. R. P. Oldham Co., 152 F. Supp. 818 (D. Cal. 1957).

112. Treaty of Friendship, Commerce and Navigation with the United States and the Federal Republic of Germany, 1954 art. V, para. 5, T.I.A.S. No. 3593.

113. See RIENOW, THE TEST OF NATIONALITY OF A MERCHANT SHIP (1937). For regulation of American cabotage, see 46 U.S.C. § 221 (1964).

114. 47 U.S.C. §§ 222(d), 310; 48 U.S.C. § 302a (1964).

115. 10 U.S.C. § 310(j) (1964).

116. It has become customary in wartime to seize national corporations controlled directly or indirectly by enemy nationals. See Clark v. Uebersee Finanz-Korporation, A.G., 332 U.S. 480 (1947).

117. Under American constitutional law, treaties give way to subsequent federal legislation. Head Money Cases, 112 U.S. 580, 598-99 (1884).

118. See Delagoa Bay Arbitration (McMurdo [U.S.] v. Portugal), MOORE, 2 INTERNATIONAL ARBITRATIONS 1865-1899. See also Christie, *What Constitutes a Taking of Property under International Law*, 38 BRIT. Y.B. INT'L L. 307 (1902).

tions chartered outside the United States on the basis of comity since the last century,[119] apparently allowing them a status in interstate commerce more favorable than that enjoyed by state-chartered corporations subject to discretionary recognition in other states.[120] Comity implies a practical need for reciprocity of recognition, a state of affairs which exists between nations, and between states within the United States. It does not exist, however, between the federal and state governments.

Corporations chartered by the federal government may operate anywhere within the United States without the consent—and even contrary to the wishes—of affected states.[121] By contrast, the powers of state-chartered corporations must give way to federal laws and regulations. As the federal government is not dependent on the states as the source of charters for corporations engaged in foreign trade, neither equality nor interdependence would require any branch of the federal government to recognize state-chartered corporations in foreign trade on the basis of a rule of comity.

Business by Sufferance

Although the federal government has by passive consent permitted the conduct of foreign trade by state-chartered corporations for more than a century,[122] no prescriptive rights can be thus acquired which cannot be curtailed or denied by later act of Congress or action of the President. As previously noted, the federal courts have on rare occasions upheld state laws and regulations affecting foreign commerce,[123] but not in the face of federal legislation preempting the field,[124] nor where such laws and regulations constitute an undue burden on such trade.[125] Corporate charters can claim no greater respect from the federal government than other state laws or regulations command.

It has been observed that the "Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as

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119. The Liverpool and London Fire and Life Assn. Co. v. Massachusetts, 77 U.S. (10 Wall.) 566 (1870).

120. Farnsworth, Residence and Domicile of Corporations 65 (1939).

121. See Federal Land Bank v. Bismarck Co., 314 U.S. 95 (1941). This does not mean that the states may not under some circumstances regulate such a corporation, Reagan v. Mercantile Trust Co., 154 U.S. 413 (1894) or tax them, Thomson v. Pacific Railroad, U.S. (9 Wall.) 579, 588 (1870).

122. See Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 589 (1839).

123. See Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 443-444 (1827); Louisiana v. Texas, 176 U.S. 1, 21 (1900).

124. See Northern Securities Co. v. United States, 193 U.S. 197 (1904).

125. In Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) the Supreme Court invalidated a state-granted monopoly to operate steamboats in New York State's "foreign" trade. See also United States v. Carolene Products, 304 U.S. 144, 147-148 (1938).

one pleases."[126] Viewed in terms of government power to regulate, no one has or can have a vested interest to engage in foreign trade in any particular manner.[127] The Supreme Court made this perfectly clear when it upheld federal legislation wiping out the "gold clauses" in contracts between American and foreign persons.[128]

An analogy in the interstate domain may clarify the law on the problem. A corporation receiving or hoping to obtain an economic benefit from riparian property on an interstate waterway cannot obtain a private property right in the flow of the stream.[129] It is entitled to no compensation if it loses access to navigable waters should the government change the course of the stream to improve navigation.[130] The federal government enjoys a servitude which it may exercise to improve the stream's navigability[131] and, though it may frustrate a private enterprise, such activity is not a taking of property.[132]

Hydroelectric dams built with State approval may be ordered destroyed if the private owner neglects to obtain a federal license required by a statute enacted by Congress.[133] Reaches of the river may be reserved for multiple development—generation by hydroelectric power, flood control and navigation—by a federal agency, as in the case of the Tennessee Valley Authority Act of 1933,[134] although the river valley had been utilized by private persons for more than a century and a half prior to the legislation. And the federal government may even use these waterways to compete with long-existing private enterprise in the wholesale and retail of electricity, an injury deemed *damnum abseque injuria* by the courts.[135] Of course, there are instances where private persons may be entitled to recover damages from the federal government, where it has exercised its power over such waterways, by virtue of the fifth amendment safeguards against deprivation of property for public use without just compensation,[136] or by the provisions of specific statutes.[137]

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126. Nebbia v. New York, 291 U.S. 502, 527-528 (1934).

127. See Board of Trustees v. United States, 289 U.S. 48, 57-58 (1933).

128. Norman v. Baltimore & O. R. Co., 294 U.S. 240 (1935).

129. United States v. Appalachian Power Co., 311 U.S. 377, 427 (1940).

130. United States v. Commodore Park, Inc., 324 U.S. 386 (1945). The destruction of oyster beds resulting from the dredging of a navigable channel has been held not to be a constitutional taking. Lewis Blue Point Oyster Co. v. Briggs, 229 U.S. 82 (1913).

131. See Gibson v. United States, 166 U.S. 269, 271-72 (1897).

132. United States v. Grand River Dam Authority, 363 U.S. 229 (1960).

133. Section 23(b) of the Federal Power Act makes it unlawful to construct such facilities. 16 U.S.C. § 817 (1964).

134. 48 Stat. 58(c), 16 U.S.C. § 831 (1964).

135. Tennessee Electric Power Co. v. TVA, 306 U.S. 118 (1939).

136. As where the government floods land by erecting dams. United States v. Lynch, 188 U.S. 445 (1903).

137. The federal government may, for example, "take over" hydroelectric projects licensed by the Federal Power Commission, upon expira-

The inadequacy of this analogy is readily apparent. Congress and the President exercise powers in foreign and international trade[138] which are materially broader than those utilized on the domestic scene. Moreover, opportunities to injure American corporations engaged in that trade are rapidly multiplying.

REDRESS AGAINST INJURY CAUSED BY THE AMERICAN GOVERNMENT

Injury to an American firm at the hands of its own government may be swift, unforeseen, complete and irremedial; and, redress may be limited in nature and manner. For example, American warships appear one day off the shore of a foreign nation. No war has been declared and none is intended. The ships are there to forestall a communist threat to the security of the United States. In the ensuing bombardment, the warehouse of an American firm are destroyed. The injury is regrettable, yet there is serious question whether the injured firm has any remedy in the American courts. In *Durand v. Hollins*,[139] an American businessman was unsuccessful in his suit for damages against the commander of an American naval vessel which had damaged his property in the course of bombarding the port of San Juan del Norte (Greytown), Nicaragua, under government orders, in order to chastize local authorities who had failed to make reparation for an attack by a mob on the United States consul of the place.[140]

Other instances are legion. An American airline engaged in the lucrative trans-Atlantic business finds its landing rights in a foreign country threatened with suspension in retaliation for the refusal of the Civil Aeronautics Board to approve a fare voted by the members of the International Air Transport Organization. An American firm developing a market in military products abroad finds itself priced out of the market by salesmen from the Department of Defense embarked on a vast program of selling American equipment to allied nations.[141] American firms forced to raise funds abroad because of the President's foreign investment guidelines may on that account find their projects curtailed or defeated by angry local governments embarrassed by the rising cost of

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tion of the license terms, upon payment of appropriate sums to the public utility. 16 U.S.C.A. § 807 (1964). See United States v. Appalachian Power Co., 311 U.S. 377, 427 (1940).

138. The power of Congress to regulate "commerce with foreign nations" comprehends every species of commercial intercourse. Board of Trustees v. United States, 289 U.S. 48 (1933).

139. 8 Fed. Cas. 111 (No. 4186) (S.D. N.Y. 1860).

140. A long list of similar episodes, extending over the period from the undeclared war against France in 1798 to Pearl Harbor in 1941 may be found in ROGERS, WORLD POLICING AND THE CONSTITUTION (1945). See also, CLARK, RIGHT TO PROTECT CITIZENS IN FOREIGN COUNTRIES BY LANDING FORCES (1913).

141. For a recital of complaints by private corporations against government competition, see *Hearings on S. 2996 Before the Senate Committee on Foreign Relations*, 87 Cong., 2d Sess. 471-485 (1962).

funds for both the private[142] and public sector[143] resulting from the guideline program.[144] An American firm which has supplied an underdeveloped country with a particular manufacture for many years may find its market totally destroyed by the local construction of a plant, with American government funds, which has sufficient capacity to meet all of the country's needs. Trade with a Latin American country is suddenly embargoed because the local government has been taken over by communists.[145]

The fifth amendment, which provides that private property shall not be taken for public use without just compensation, constitutes a restraint upon both Congress and the President.[146] Private corporations are entitled to its protection.[147] This does not mean that they are entitled to a particular type of procedural relief. "In all cases, that kind of procedure is due process of law which is suitable and proper to the nature of the case, and sanctioned by the established customs and usages of the courts."[148] Due process means a hearing, and imports a judicial review of the action of administrative or executive officers involved. All of this sounds comforting; however, the value of these procedural remedies depends upon whether the governmental action complained of is one reviewable at all by the courts.

The question of just compensation is judicial,[149] but it is a matter of legislative discretion as to what tribunal will hear the case.[150] The extent to which the power will be exercised is initially a matter of legislative discretion.[151] Whether the judiciary have power to review a legislative determination that property is being taken for a *public* use is not entirely clear.[152] If property is taken by the United States in the lawful exercise of the power of eminent

142. For an account of the possible impact of the March 1965 foreign investment guidelines on Norway's shipbuilding industry which had become dependent upon funds from American banks, see *America's Restrictions Bite,* The Economist, May 29, 1965, p. 1064.

143. See *European Coal, Steel Group Postpones Plan for $20 Million Loan,* Wall Street Journal, December 20, 1965, p. 18.

144. This aggravates the growing concern of some developed nations over the role of giant American firms in local industry. See *Capital Attitudes,* The Economist, August 14, 1965, pp. 625-627.

145. See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964); United States v. The William, 28 Fed. Cas. 614, 620-623 (No. 16,700) (D. Mass. 1808).

146. United States v. Jones, 109 U.S. 513, 518 (1883); United States v. Carmack, 329 U.S. 230, 241 (1946).

147. Sinking Fund Cases, 99 U.S. 700, 719 (1879). The due process provision finds its roots in Chapter 39 of Magna Carta signed by King John in the presence of prelates of the Church and barons 650 years ago.

148. *Ex parte* Wall, 107 U.S. 265, 289 (1883).

149. Monongahela Navigation Co. v. United States, 148 U.S. 312, 327 (1893).

150. United States v. Jones, 109 U.S. 513 (1833).

151. Shoemaker v. United States, 147 U.S. 282, 298 (1893).

152. See United States *ex rel.* T.V.A. v. Welch, 327 U.S. 546 (1946).

domain, but without condemnation proceedings, the owner may bring suit for just compensation in the court of claims or a United States district court under the Tucker Act.[153] Where the government impresses property into public use in time of war or public danger without its owner's consent, there is an implied promise on the part of the United States to reimburse the owner.[154]

Should the government unlawfully seize property and attempt to hold it without paying just compensation, the courts will entertain jurisdiction over a suit to eject the government officials. In such manner did the eldest son of General Robert E. Lee prove his right to possession of Arlington Hall, inherited from his grandfather and arbitrarily confiscated for non-payment of taxes during the Civil War.[155]

There are many occasions when private property rights are destroyed or severely injured as a result of lawful actions of the federal government[156] without any redress for damages. Slavery and all property rights in slaves were abolished by President Lincoln's Emancipation Proclamation in 1863 and subsequent legislation including the fourteenth amendment. The liquor business was abolished upon adoption of the eighteenth amendment.[157] Treasury notes were made legal tender during the Civil War in payment of debts previously contracted.[158] Private contract provisions calling for payment in gold coin were made invalid by statute during the great depression of the 1930's.[159] Domestic restraints on oil production[160] and oil import controls[161] have sometimes reduced the value of private property. The injuries resulting from these government actions were and are deemed not a direct taking of property requiring compensation but the consequential result of the exercise of lawful powers of government.[162] Where injury is in the form of the frustration of business opportunities, there may not

153. Jacobs v. United States, 290 U.S. 13 (1933).

154. United States v. Russell, 80 U.S. (13 Wall.) 623 (1871).

155. United States v. Lee, 106 U.S. 196, 220 (1882).

156. See United States *ex rel.* T.V.A. v. Powelson, 319 U.S. 266 (1943).

157. Mexico cited such examples against the United States during the dispute arising out of the seizure of American oil properties by the Mexican government. See GORDON, THE EXPROPRIATION OF FOREIGN-OWNED PROPERTY IN MEXICO 160 (1941).

158. Legal Tender Cases, (Knox v. Lee), 79 U.S. (12 Wall.) 457, 551 (1871).

159. Norman v. Baltimore & O. R.R. Co., 294 U.S. 240 (1935).

160. The oil proration laws and regulations of individual producting states are backed up by the Connolly "Hot Oil" Act, 49 Stat. 30 (1935), 15 U.S.C. §§ 715-715m (1964) designed to forbid the interstate movement of oil produced in violation of those regulations.

161. *E.g.*, a Tidewater Oil Company refinery constructed on the east coast and designed to handle crude oil from the Middle East could not operate at design capacity due to import restraints.

162. Henderson v. Bryan, 46 F. Supp. 682 (S.D. Cal. 1942). But there are limits, however vague, to the non-compensable exercise of the police power. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

be compensation because: "In the absence of a statutory mandate the sovereign must pay only for what it takes, not for opportunities which the owner may lose."[163]

When the government takes property in the exercise of its war power, the right of redress may be very small if non-existent. The affected firm may find that its right to recovery is limited by a court which compares its claim for damages against the uncompensated loss of life, liberty and property suffered by other American nationals in wartime.[164] While the fifth amendment is not suspended in time of war,[165] damages incident to actual battle are not compensable.[166] The rights of the nation to self defense and self preservation have been held to have no connection with the right of eminent domain. Consequently, they are beyond the reach of the Constitution to compel redress.[167]

The law has failed to keep pace with present-day world political conditions. Various undeclared wars appear to be the norm, yet the law provides no workable distinction between cases when damages are compensable[168] and cases when they are not.[169] The result is that the area of non-compensable injury has greatly widened.

A corporation engaged in foreign trade is interested principally in remaining in business and in expanding that business as economic conditions warrant. In the present state of the law, an American corporation anticipating injury or even the extinction of its business as a result of activities of the American government in foreign trade is unable through the courts to enjoin the implementing federal officials to avoid the injury. Nor is the corporation entitled as a matter of right to prior consultation with the government, so that the injury might be mitigated or avoided,[170] although recent Presidents have adopted the practice of consulting business leaders on many problems.[171]

Investment guarantees may be available to protect the American corporation against certain injuries caused by foreign govern-

163. United States *ex rel.* T.V.A. v. Powelson, 319 U.S. 266, 281 (1942).

164. United States v. Central Eureka Mining Co., 357 U.S. 155 (1958).

165. See Silesian-American Corp. v. Clark, 332 U.S. 469 (1947); Becker Steel Co. v. Cummings, 296 U.S. 74 (1935).

166. See Caltex (Phillipines), Inc. v. United States, 100 F. Supp. 970 (Ct. Cl. 1951).

167. See Grant v. United States, 1 Ct. Cl. 41, 2 Ct. Cl. 551 (1868); *Cf.*, United States v. Pacific R.R., 120 U.S. 227, 234 (1887).

168. See Caltex (Phillipines), Inc. v. United States, 100 F. Supp. 970 (Ct. Cl. 1951).

169. War inevitably produces hardships, suffering and loss. St. Regis Paper Co. v. United States, 110 Ct. Cl. 271, 76 F. Supp. 831 (1948).

170. Firms interested in tariff reforms arising out of the Kennedy Round of negotiations at G.A.T.T. have been afforded an opportunity to argue their cause before final decisions are made. But this is the exceptional case.

171. *E.g., Report to the President on the White House Conference on Export Expansion,* September 17 and 18, 1963.

ments, but there is no like remedy available against similar injuries caused the same firms by the United States. The corporation is left to the dubious remedy of damages after the event, provided it is able to prove that the injury represents a taking of property for which compensation is required under the fifth amendment, a tort remediable under the Federal Tort Claims Act,[172] or the violation of a contract with the government giving rise to a suit for damages.

As a general rule, the federal government may not be sued without its consent.[173] If the corporation has a contract with the United States calling for sales or services, suit may be brought on the contract if the government does not carry out its part of the bargain.[174] If a person experiences damages sounding in tort, he may be able to sue the United States in the Court of Claims or in a United States District Court under The Federal Tort Claims Act of 1947.[175] But there are exceptions under this statute important to our discussion. Thus a corporation may not bring a suit under this statute where injury is caused by an employee of the government who exercises due care in the execution of a statute or regulation, "whether or not such statute or regulation be valid."[176] Further, suits may not be brought under the statute for injuries caused by interference with contract rights, or on a claim arising in a foreign country, or for combat injuries during time of war.[177]

Under such circumstances, one may reasonably expect that the corporation will do its utmost through persuasion of government officials to head off injurious conduct or to mold government policy along lines conducive to the maximum well-being of the corporation's foreign activities and its overall economic health. In view of the important role that these corporations play in terms of the prosperity of the domestic economy and the success of foreign policy, it cannot be said that their powers of persuasion are small. At least this has sometimes been the experience of our government during the present century.

CONCLUSION

It would seem to be in the public interest, of the United States, as well as affected foreign countries, for the foreign activities of American corporations to be consistent with and even to support the foreign policy of the United States as established by Congress and the President.[178] At the least, they should not be allowed to undo

172. Federal Tort Claims Act, 60 Stat. 842 (1946), 28 U.S.C. §§ 1291, 1346(b)(c), 1402(b), 1504, 2110, 2401(b), 2402, 2411(b), 2412(c), 2671-80 (1964).

173. Kawananakoa v. Polyblack, 205 U.S. 349 (1907).

174. See Lynch v. United States, 292 U.S. 571, 579 (1934).

175. See WRIGHT, THE FEDERAL TORT CLAIMS ACT (1957).

176. 28 U.S.C.A. § 2680(b) (1964).

177. 28 U.S.C.A. § 2680(h),(j) & (k) (1964).

178. See Kronstein, *Government & Business in International Trade*, in CORPORATION TAKE-OVER 150 (1964).

that policy. Assuming these propositions to be true, the present instruments for assuring the attainment of such ends are inadequate whether viewed from the side of the corporation or of the federal government.

Despite their vast size and importance to the international economy,[179] American corporations engage in foreign trade by sufferance of the federal government. Opportunities abound for injury to these corporations as the direct or indirect result of American foreign policies and their implementation. Yet they have no right to prior consultation, no public insurance available against such injuries, nor an adequate forum for redress.[180] With no charter from or contract with the federal government which requires respect for their rights to trade in foreign commerce, they have very little legal protection against drastic changes in government policies affecting them.

The fact that the federal government is not the source of the charters of the corporations can only serve to dull the federal government's sense of responsibility for their actions abroad. The absence of any patent obligation to respect their investments and business opportunities may foster an indifference as to the impact of American governmental actions upon any one of them.

This is not a healthy situation. It is essentially a problem of power and its legitimate and just use. The power of American corporations for good and evil in foreign trade grows at a rapid rate, accenting the need for accountability.[181] The role the American government is called upon to play in foreign affairs augurs a major collision between these two powers. And in that ultimate struggle, it is submitted that the corporations will prove to be luxuriant plants with stems of straw.

A major clash could be followed by the speedy enactment of hastily considered legislation against state-chartered corporations, designed to assure in the future the compatibility of their foreign activities with those of the United States Government. But the problems are so complex and the impact of any such action so far-

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179. "Almost the entire flow of U.S. direct investment to Latin America has come from somewhat over 300 large corporations." STUDY PREPARED FOR SENATE SUBCOMMITTEE ON AMERICAN REPUBLICS' AFFAIRS, SENATE COMMITTEE ON FOREIGN RELATIONS, 86th Cong., 2d Sess.; UNITED STATES-LATIN AMERICAN RELATIONS, UNITED STATES BUSINESS AND LABOR IN LATIN AMERICA VIII (Comm. Print 1960). See also Miller, *The Corporation as a Private Government in the World Community*, 57 VA. L. REV. 1539 (1960).

180. See Timberg, *Wanted: Administrative Safeguards for Protection of Individual in Economic Regulation*, 17 ADMIN. L. REV. 159 (1965).

181. In debates on the East India Bill in 1783, Edmund Burke insisted that the powers of The East India Company were a *trust* "and it is of the very essence of every trust to be rendered *accountable;* and even to totally *cease,* when it substantially varies from the purposes for which alone it could have a lawful existence." 2 BURKE, SPEECHES 411 (1816).

reaching that we should not wait for this to happen. The subject should be discussed by Congress during the present period of tranquility in government-corporation relations to the end that accountability and responsibility may be assured on both sides.

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